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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 26

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion and dissenting opinion in the Court of Claims (R. 35-40) are reported at 109 C. Cls. 555.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 41). On February 2, 1948, the plaintiff's motion for a new trial was allowed and the conclusions of law were amended

to include provision for interest (R. 41). The petition for a writ of certiorari was filed on February 24, 1948, and was granted on May 3, 1948 (R. 46). The jurisdiction of this Court rests upon section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the United States to pay compensation to an owner of land upon a non-navigable tributary of a navigable river where, for the purpose of improving navigation, the Government stabilizes the level of the river at the ordinary high-water mark and does not raise the level beyond that mark.

2. Whether a finding that the Government has exercised the privilege, for which respondent is given compensation, of maintaining and operating a lock and dam some 25 miles downstream from respondent's land, is sufficient to satisfy the requirement that the findings contain an accurate description of the property which the court concludes was taken from respondent.

3. Whether Congress, by an act "modifying" the project "in accordance with the recommendation of the District Engineer" that "authority be granted the Secretary of War to acquire" 1,254 acres of "low-lying lands" and to provide in an unspecified manner for the "tiling and ditching" of 366 additional acres of other land and author-

izing an appropriation for that purpose, created a right in the plaintiff to compensation for damages to 1,710 acres of land, the title to which has not passed and will not pass to the United States.

STATUTE INVOLVED

The relevant portion of the Act of August 26, 1937, 50 Stat. 844, 848, is set out in the Statement, *infra*, pp. 9-10.

STATEMENT

The findings of the Court of Claims may be summarized as follows:

The United States erected Lock and Dam No. 26 on the Mississippi River near St. Charles, Missouri, for the purpose of providing a nine-foot navigable channel in the river, construction being completed in 1938 (Fdg. 4, R. 22). The respondent owns land known as the Baldwin Farm situated on Dardenne Creek, a non-navigable stream which empties into the Mississippi about one and one-half miles below respondent's property and 25 miles above Dam No. 26 (Fdg. 2, R. 21-22). Prior to construction of the dam the ordinary high-water mark of the river at the mouth of Dardenne Creek was 420.4 feet (Fdg. 11, R. 27).[1] The average pool elevation maintained there from August 1938 to May 1941, after the dam was put

[1] For convenience, elevation will be referred to at the mouth of Dardenne Creek, although the gauge was located at Dixon's Landing about a mile away, since the court found that the elevations at those points are "about the same" (Fdg. 11, R. 27).

in operation, was 420.4 feet (Fdg. 12, R. 27).[2] Respondent's farm varies in elevation from 422.7 feet to 428 feet and is protected by levees whose lowest elevation is 432.7 feet (Fdg. 11, R. 7). Hence, as the court found (Fdg. 13, R. 28), "the operation of defendant's dam and pool does not cause any flooding of plaintiff's land."

The injury for which compensation was awarded resulted from interference with surface and subsurface drainage. Many years prior to the erection of Dam No. 26, a system of ditches and culvert pipes for lateral surface drainage had been constructed with a main carrying water to a borrow pit from which some 14 or 15 outlet pipes drained water into Dardenne Creek. (Fdg. 15, R. 29.) In 1943, two 48-inch pipes were laid for a similar purpose. These outlet drains are at an elevation of about 420 feet (Fdg. 17, R. 30). The bed of the creek is at elevation 410 to 413 feet and, prior to the erection of Dam No. 26, the water in the creek was two or three feet deep except during floods on the Mississippi or after heavy rainfall on the watershed of the creek (Fdg. 17, R. 30). As a result of operation of Dam No. 26, elevation of the water in the creek has been raised six or seven feet above the previous normal level "so that the creek water now backs into some of

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[2] The maximum authorized pool elevation at Dam 26, 25 miles downstream, is 419 feet. When the water is held at that elevation, the elevation at the mouth of Dardenne Creek varies from 419.1 to 422.5 feet, depending upon the volume of flow in the river (Fdg. 12, R. 217).

the outlet pipes in the plaintiff's levee,[3] thereby obstructing and delaying the drainage of surface water from plaintiff's land" (Fdg. 18, R. 31). The court also found (Fdg. 19, R. 31), that——

> The record does not disclose the extent to which the operation of Dam 26 obstructs or delays the drainage of surface water from the Baldwin Farm and there is no satisfactory proof with respect to the character or the cost of additional drainage and pumping facilities which will be required to offset the condition created by the operation of the dam. However, under controlled river conditions, the water is held on the land after a rain for longer periods than was formerly the case and it will be necessary to provide additional drainage and pumping facilities in order to farm the land.

Some surface water drains vertically into the sub-soil. Sub-surface drainage depends upon the fact that there is a stratum of water-bearing sand under the land, the top elevation of which varies from 412 to 414 feet. The water in the sand is affected by the rise and fall of the Mississippi River and by rainfall on the land (Fdg. 16, R. 30). However, the water table in the respondent's land is now, and always has been, higher than the river stage (Fdgs. 16, 20, R. 30, 32), hence water from

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[3] All of these pipes have swinging doors which close when the water in the creek rises to the level of the gates (Fdg. 15, R. 29).

the river has not been forced under respondent's land. Spring floods of the Mississippi and Dardenne Creek occur with about the same frequency after erection of Dam No. 26, as they did before. However, prior to erection of the dam, the river stage after the floods dropped to about 410 to 412 feet elevation, where it remained for several months at the end and beginning of the year, thus furnishing drainage of the water from the land (Fdg. 19, R. 31-32). At the present time, the river is not allowed to drop to those extreme low levels, but is held at the natural ordinary high-water mark. The result has been that drainage of underground water beneath a large area of the land has been almost entirely shut off, the opportunities formerly available for draining surface and sub-surface water are no longer available, and the water table is four to five feet higher than it formerly was during low stages of the Mississippi River (Fdgs. 18, 19, 20, R. 31-32).

This change of conditions required the planting of different crops which mature in a shorter time and the yield and quality of corn and wheat decreased (Fdgs. 20, 21, R. 32). Before erection of the dam, a certain portion of the land was valuable only as a duck hunting preserve and its value has not been diminished by operation of the dam (Fdg. 24, R. 34). As to another tract the findings state (Fdg. 24, R. 34):

> Prior to August 8, 1938, the date on which full-pool stage above Dam 26 was first obtained, this 302.96 acres had a limited use for agricultural production, but there is no satisfactory proof of the exact amount by which the operation of the dam impaired its market value. A reasonable estimate of the amount by which its value was reduced by August 8, 1938, as a result of the operation of Dam 26, is the sum of $1,694.60.

A third tract was diminished in market value by more than one-half of its former value and such impairment amounted to $13,475.00 (Fdg. 26, R. 34-35). The value of a fourth tract was reduced $7,350.00 (Fdg. 27, R. 35). Finally, the court found (Fdg. 29, R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

On the basis of these findings, judgment was entered on December 1, 1947, for $22,519.60. The conclusions of law were amended on February 2, 1940, to include an allowance of interest from August 8, 1938, as a part of just compensation (R. 41).

The Court of Claims held that, by preventing surface or underground drainage and so convert-

ing land into a "pond or marsh," the Government took the land (R. 37-38). For this holding, it cited no authority. It held further that since respondent's land was located on a non-navigable tributary of a navigable stream, rather than on the navigable stream itself, the Government was bound to pay damages even though it had not raised the level of the navigable stream above its ordinary high-water mark (R. 38-39). For this further holding, it relied on *United States* v. *Cress*, 243 U. S. 316. Judge Whitaker dissented on the ground that, since the water of the navigable stream had not been raised above ordinary high-water mark, there was no liability on the part of the United States in view of the rule of *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

Respondent also asserted a claim that Congress had consented to its recovery in the amount of $93,540.00 (R. 12). The Court of Claims found the facts as to this claim to be as follows: In 1932 a Congressional committee requested a determination of damages which might be caused to lands bordering the river by seepage and backwater (Fdg. 5, R. 22). A report submitted in 1934, which refers to respondent's land under the name "Wiedmer Chemical Co. Drainage District," as do later reports, concluded that no adverse effect would be caused such lands by the proposed improvement (Fdg. 6, R. 22-23). In 1935 the House Committee requested estimates of the exact

damages that would be caused by execution of the project (Fdg. 7, R. 23). A detailed report dated June 1, 1936, which appears in Rivers and Harbors Committee Document No. 34, 75th Congress, was made by the District Engineer.[4] After a discussion of various factors, the report concluded (Fdg. 8, R. 25):

> It is therefore recommended that authority be granted the Secretary of War to acquire the low-lying lands in the above seven districts, for the United States in lieu of payment to the districts of the capitalized cost of maintaining their present drainage status and that the total estimated cost of $624,645 be made available therefor immediately.

This report was approved by the Division Engineer, the Board of Engineers for Rivers and Harbors, and by the Chief of Engineers (Fdg. 8, R. 25).

The Act of August 26, 1937, 50 Stat. 844, 848, provided in part:

> Mississippi River between Missouri River and Minneapolis, Minnesota: The existing project is hereby modified in accordance with the recommendation of the District Engineer

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[4] Apparently the District Engineer had made a preliminary report unfavorable to respondent, because in January 1937 respondent appealed to the Board of Engineers for Rivers and Harbors, stating that the District Engineer had said that there would be no damages to respondent's property (Fdg. 10, R. 26-27).

in the report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress.

The court below rejected respondent's claim based upon the 1937 Act on the ground that, while it might have constituted an authorization to acquire some of respondent's land by eminent domain and to spend money in tiling and ditching another part of it, the Act did not constitute a Congressional waiver of immunity from suit or a confession of liability for the consequences of building the dam (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that any property had been taken from respondent;

2. In holding that impairment of drainage in the circumstances of the present case constituted a taking.

3. In failing to define what property interest was taken.

4. In entering judgment against the United States.

SUMMARY OF ARGUMENT

I

The navigation improvement project in the instant case has not raised the level of the river above high-water mark. Hence no question is here

presented as to whether a cause of action exists for the taking of intangible riparian rights when the river level is raised above high-water mark.

It is well settled that when the Government confines its activities to the bed of a navigable stream and does not flood fast lands there is no liability because there is no taking. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Willow River Co.*, 324 U. S. 499. This is so because the Government's paramount power over navigable streams extends to the entire bed of the stream. The decision of this Court in *United States* v. *Chicago M. St. P. & P. R. Co.*, 312 U. S. 592, specifically overruled so much of *United States* v. *Lynah*, 188 U. S. 445, as held that recovery might be had for the flooding of lands below high-water mark. Since the water level was not raised above high-water mark here, there is no liability.

The decision in *United States* v. *Cress*, 243 U. S. 316, does not support a contrary view. Even if it be assumed, *arguendo*, that an impairment of drainage is equivalent to a flooding of land (a conclusion of the Court of Claims which we believe to be erroneous), the *Cress* decision does not justify recovery by respondent. The *Cress* case probably involved a raising of the water level above high-water mark. If it did not, then its authority did not survive the demise of the *Lynah* case on which it was based. No distinction can be based upon the fact that respondent's land was located

on a non-navigable tributary of a navigable stream. The *Cress* case does not purport to hold that such owners have greater rights than do riparian owners on navigable streams. The power of the Federal Government to exercise its dominant servitude over the bed of the stream cannot be affected by the location or character of the landowners who may be disadvantaged by such action.

II

The Court of Claims was under a duty to make a finding containing an "accurate description of the property taken." *United States* v. *Causby*, 328 U. S. 256. No such finding was made. The only finding of this nature was Finding 29 which *related to the privilege exercised by the Government*. But the United States did not take from respondent the "privilege" of carrying on the governmental activity of improving navigation. And, since there was no finding describing a property interest in respondent's land, there was no "accurate description of such interest." The failure to make a finding describing the interest taken and the nature of Finding 29 emphasize the fact that there has been no taking but merely an exercise of the Federal power to improve navigation.

III

Respondent may not support the judgment below on the ground that the Act of August 26, 1937,

constituted a confession of liability in the amount of $93,540. The Act simply authorized the Secretary of War, if he believed it advisable, to acquire in fee 1,254 acres of land and in addition to ditch and tile 366 acres. It did not direct the Secretary to do so, nor did it direct payment of any amount to respondent. The $93,540 represented simply an estimate of the cost of such acquisition and ditching and did not purport to establish the land value. The decision in *Mitchell v. United States*, 267 U. S. 341, is conclusive against respondent's claim under this heading.

Moreover, since the present argument would enlarge the scope of the judgment below rather than merely support it on a ground rejected by the Court of Claims, it cannot now be urged in view of respondent's failure to file a cross-petition for certiorari.

ARGUMENT

I. THE UNITED STATES IS NOT LIABLE HERE SINCE IT DID NOT RAISE THE WATERS OF THE NAVIGABLE STREAM ABOVE THE ORDINARY HIGH-WATER MARK

A. Lands below high-water mark are subject to a dominant servitude in the interests of navigation, whose exercise does not give rise to compensation

The crucial fact in this case, that the average pool elevation maintained after erection of the Government's navigation dam was the same as the ordinary high-water mark of the river, viz., 420.4 feet (Edgs. 11, 12, R. 27), narrows the legal issues here, and underscores the error of the court below.

It narrows the issues, because it makes unnecessary consideration of the question whether, where the United States has raised the flow of the river above ordinary high-water mark in the interest of navigation, there is a cause of action in respect of the impairment of intangible riparian rights such as the right to the flow of a stream in its natural condition, or the right to subsurface drainage, or the right of access to the waters. Here no such rise has taken place.

And it underscores the error committed below, because the law is clear that where, as here, the activities of the Government have been confined to the bed of a navigable stream, and where, as the court below found, the operation of the dam does not cause any flooding of the land (Fdg. 13, R. 28), there is no liability because there is no taking. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Willow River Co.*, 324 U. S. 499. And, until the decision in the instant case, that was also the rule in the court below. *Willow River Power Co., Inc.* v. *United States*, 101 C. Cls. 222, 228; *Kelley's Creek and N. W. R. Co.* v. *United States*, 100 C. Cls. 396.

The basis of this rule is that the paramount power of the Federal Government over navigable streams extends to the entire bed of a stream, which includes all lands below the high-water mark. As this Court said in *United States* v. *Chicago, M., St. P. & P. R. Co.*, *supra*, 312 U. S. at 596-597,

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing *Scranton* v. *Wheeler*, 179 U. S. 141, 143, 144; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 263; *Willink* v. *United States*, 240 U. S. 572, 580; *Delaware R. Co.* v. *Weeks*, 293 Fed. 114, 120 [D. Del.]; *Barr* v. *Spalding*, 46 F. 2d 798, 800 [W. D. Ky.]; *Marret* v. *United States*, 82 C. Cls. 1, 13; *United States* v. *Meyer*, 113 F. 2d 387, 398 [C. C. A. 7.]] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

Accordingly, the Court overruled so much of *United States* v. *Lynah*, 188 U. S. 445, as held that a flooding of lands between the high and low water lines gave rise to an implied promise to pay just compensation, 312 U. S. at 598.

Similarly, in *United States* v. *Willow River Co.*, 324 U. S. 499, after referring to many authorities, this Court said (p. 509):

> It is conceded that the riparian owner has no right as against improvements of navigation to maintenance of a level below high-water mark, but it is claimed that there is a riparian right to use the stream for run-off

> of water at this level. High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid. But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *Willink* v. *United States*, 240 U. S. 572.

In view of these late authorities, it follows that if *United States* v. *Cress*, 243 U. S. 316,[5] involved an award of compensation arising out of a raising of the navigable stream up to the high water mark, then, obviously, its authority did not survive the demise of the *Lynah* case, on which it rested. 243 U. S. at 325, 326, 328, 329.[6] More likely, however, as the dissenting judge below thought (R. 40), the *Cress* case involved a raising of the Kentucky River above high water mark,[7]

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[5] The opinion entitled "*United States* v. *Cress*" also deals with the companion case of *United States* v. *Kelly*, No. 718, and it is with the holding in the latter case (243 U. S. at 329-330) that we are here concerned.

[6] The *Kelly* portion of the *Cress* opinion also relied (243 U. S. at 320, 326) on *Monongahela Navigation Co.* v. *United States*, 184 U. S. 312, which was subsequently restricted in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 89, as resting upon an estoppel arising out of its peculiar facts.

[7] The meager record in the *Kelly* case, No. 718, Oct. T., 1916, sheds no light on the point.

in which event it would be inapplicable here. For, as this Court has already observed, the question of liability for improvements to navigation which affect the land between high and low water marks was not discussed in the *Cress* opinion, which must accordingly "be confined to the facts there disclosed." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597; see also *United States* v. *Willow River Co.*, 324 U. S. 499, 507.

The court below admitted that the two cases just cited "may indicate that the *Cress* case does not have a good prospect of survival. But," observed the Court of Claims, "it has not been overruled" (R. 39), and it relied on the circumstance that "In the instant case, as in the *Cress* case, the harm was done by the raising of the water level in a nonnavigable stream" (*ibid.*). Accordingly it found a taking and awarded damages.

This approach, as Judge Whitaker was at pains to point out (R. 39-40), completely misapprehends the rationale of the *Cress* case and what was actually decided there, as analysis of the reasoning of the court below in the present case will show.

B. Nothing in *United States* v. *Cress* requires an award of compensation here

The Court of Claims started with the premise that the holding in *United States* v. *Causby*, 328 U. S. 256, demonstrated (R. 37) that "the idea of a 'taking' in the constitutional sense is not limited to the assertion of one of a closed list of

normal interests in land." It then argued that (R. 37-38)——

> * * * One of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture. That incident has now been impaired, in order to benefit navigation on the Mississippi. It is the kind of an incident of ownership that could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden in rem upon the plaintiff's land, which would have passed to subsequent owners and bound them. We see no real difference between burdening the land by artificially flooding it with water, which has often been held to be a taking,* and converting it into a pond or a marsh by preventing the surface water which falls on it or flows on it from higher land from leaving it by either surface or underground drainage. We think that the fact that the change in the nature of the plaintiff's land has been accomplished principally by erecting a water barrier at its margin, preventing egress of water, rather than by causing the invasion of the land by water from outside, should not be the deciding factor.

* [Footnote in original:] *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Dickinson*, 152 F. (2d) 865, aff'd 67 S. Ct. 1382.

And it concluded (R. 39)——

> * * * In the instant case, as in the *Cress* case, the harm was done by the raising of the water level in a nonnavigable stream, and the Government was not privileged, in the improvement of the navigability of the Mississippi, to "take" without compensation the interest which we have discussed above in the plaintiff's land on Dardenne Creek.

This reasoning involves two demonstrable fallacies:

(1) Assuming *arguendo* that the prevention of surface and subsurface drainage is the same as an underflooding,[8] and assuming further that an underflow is the same as an overflow,[9] there would still be no liability here. For there is no liability when

[8] Respondent apparently suggests (Br. Opp. 2, 12, 14) that there has been an underground invasion by water pushing into the soil. The Government's activities have not caused any underground invasion since, as respondents recognize (Br. Opp. 2), the water table under the land is always higher than the water level of the river (Fdgs. 16, 20, R. 30, 32). The river could not force water above the level of the river itself. Hence river water is not forced into respondent's land; the water in the land simply does not drain away as fast as it formerly did. Thus, *Pixley* v. *Clark*, 35 N. Y. 520, cited by respondent (Br. Opp. 12-13) is irrelevant since there waters of a stream were forced through the banks into the subsoil of plaintiff's land.

[9] Our view is that a mere impairment of drainage without any invasion of the property itself does not constitute a taking of such property.

Ordinary high water mark has no relevancy where the damages complained of are changes in the flow of the river, not the flooding of land. For, unlike fast land, the flow of the

the overflow is caused by an improvement in navigation which does not raise the water level above the ordinary high-water mark, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and consequently, on the Court of Claims' own premise, there can be no liability when the damage is caused by an overflow where the waters of the stream, as here, did not rise above the ordinary high-water mark. If the *Cress* case, as we think, involved a rise above high-water mark, it is inapplicable here; and if it did not, then, as we have already pointed out, *supra*, p. 16, it perished simultaneously with *United States* v. *Lynah*, 188 U. S. 445. On this

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river is at all times subject to the servitude for navigation created by the Constitution in favor of the Federal Government. *United States* v. *Willow River Co.*, 324 U. S. 499; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Scranton* v. *Wheeler*, 179 U. S. 141, 163. Therefore, regardless of the extent in the alteration of such flow, whether extending above or below ordinary high water mark, there can be no liability predicated on such interference alone. Compensation is due only for whatever damages may be done property not subject to any servitude in the interest of navigation, such as fast land, or (*Hood* v. *United States*, 49 C. Cls. 669, 680) structure erected above high water.

Intangible riparian rights are subject to the same servitude in the interest of navigation of the stream as is the bed of the stream, and nothing is due for their impairment by the United States in the exercise of its paramount authority. Such intangible rights include the right of access to the waters (*Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269) and the right to subsurface drainage (*United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7)), certiorari denied, 311 U. S. 706; *Lynn* v. *United States*, 110

point the dissent below is simply unanswerable—and certainly it is not answered by anything in the Court of Claims' opinion.

The fallacy in the reasoning of the court below may be demonstrated by another approach. As this Court said in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424——.

> The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable". Exclusion of

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F. 2d 586 (C. C. A. 5); *Christman* v. *United States*, 74 F. 2d 112 (C. C. A. 7).

The cases last cited represent applications of the fundamental distinction between consequential damage and a taking. A taking occurs when there is a permanent flooding of fast lands outside the bed of a river or permanent liability to intermittent but inevitably recurring overflow. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Cress*, 243 U. S. 316; *Jacobs* v. *United States*, 290 U. S. 13, 16. But it has been recognized that these cases represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *United States* v. *Sponenbarger*, 308 U. S. 256, 265. Impairment of use of property without such permanent invasion does not constitute a taking. *Bedford* v. *United States*, 192 U. S. 217, 225; *Manigault* v. *Springs*, 199 U. S. 473, 483-484; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351; *Horstmann Co.* v. *United States*, 257 U. S. 138; *Sanguinetti* v. *United States*, 264 U. S. 146; *Gibson* v. *United States*, 166 U. S. 269.

Respondents refer (Br. Opp. 9-12) to *United States* v. *Williams*, 188 U. S. 485, a companion case to *United States* v. *Lynah*, 188 U. S. 445, and to *United States* v. *Causby*, 328 U. S. 256. The distinction between those situations and the

riparian owners from its benefits without compensation is entirely within the Government's discretion.

See also *United States* v. *Willow River Co.*, 324 U. S. 499, 507-508. The injury to respondent resulted from the fact that the Government's project held the level of the river at or near high water mark for longer periods than theretofore, thus depriving respondent of the advantage of drainage when the navigable river levels were at lower

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present case was clearly stated in the *Lynah* decision. There, while holding that a taking had occurred because there was a flooding of the land, this Court approved the holding of *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.), that there was no taking when interference with drainage made it necessary to raise levees and to provide new drainage into back river. The *Causby* case likewise rested on the fact that there was an invasion of the claimants' property (328 U. S. at 265).

Consequently when, as here, there is no invasion, there is no taking. The error of the court below on the present point lies in its assumption (R. 38) to the contrary, viz., that recovery follows any impairment of usefulness of land caused by the Government, whether through invasion or otherwise. This view, of course, completely obliterates the settled distinction between taking and damage, and would in effect rewrite the Fifth Amendment. But, as this Court stated in *Sanguinetti* v. *United States*, 264 U. S. 146, 149, "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

If, therefore, the issue could be reached here, it would be clear that there is no basis in law for the assumption of the court below that underflow is the same as overflow.

stages. It was this advantage to which the court below referred as one of the "valuable incidents of the plaintiff's ownership" (R. 37). Thus, the theory is that respondent has a property right in the natural flow of the navigable stream. It is clear, certainly since the *Chicago M. St. P.*, *Appalachian Power* and *Willow River* decisions, to say nothing of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (which was not cited to the Court in the *Cress* case), that no such property right exists as against the United States.

(2) The only other basis for supposing that the *Cress* case compels recovery here is the circumstance that, there and here, the actual damage arose from raising the level of a non-navigable stream, Miller's Creek there and Dardenne's Creek here.

But that circumstance is not and in the nature of things cannot be controlling. Granted as it must be that riparian owner on the navigable stream cannot complain when the water raised to ordinary high-water mark causes a flooding of his land, it necessarily follows that the upstream owner on the non-navigable tributary cannot claim greater rights. In the *Cress* case, which allowed recovery, it was assumed by the Court that he could not. 243 U. S. at 319. Certainly nothing in that case attempts to give riparian owners on non-navigable tributaries greater rights in navigable streams than those enjoyed by riparian owners on the main navigable streams.

Now, the basis for the *Chicago, M., St. P. & P. R. Co.* rule is that the entire bed of the stream, i. e., up to ordinary high-water mark, is subject to a dominant servitude in the interests of navigation; and necessarily that servitude extends to non-navigable tributaries affected through the inexorable operation of natural phenomena. The proposition that water seeks its own level is quite as sound in law as it is in physics. Whether the rise of water of a navigable stream not above the high-water mark, therefore, affects the natural flow of that stream, or causes a flooding of riparian land, or affects the natural flow of a non-navigable tributary, or causes a flooding of riparian lands on the tributary, can make no difference. In each instance the damage caused results from the exercise of the dominant servitude of navigation, and, so long as the waters do not rise above ordinary high-water mark, there can be no liability on the part of the United States.[10] Certainly the right of the Federal Government to exercise its dominant servitude over the bed of the stream without payment of compensation cannot be affected by the location or character of the landowners who may be disadvantaged by such action. And

[10] Frequently, of course, there is no liability even when the water is raised above that level (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Willow River Co.*, 324 U. S. 499), but the extent of this additional zone of non-liability is never reached upon the present record.

since the riparian owner has no right to the maintenance of the level of the navigable stream below high-water mark, the owner of lands riparian to the non-navigable tributary of the navigable stream does not have greater rights. The contrary conclusion reached below thus has the curious result of conferring on a landowner riparian to a non-navigable tributary rights which are denied the landowner riparian to the navigable stream. The Court of Claims has given the landowner on Dardenne Creek rights in the maintenance of the Mississippi's level which landowners riparian to the Mississippi could not possibly possess. Thus, in the view of the Court of Claims, the farther away from the Mississippi that a man's lands are located, the greater his right to have the flow of that mighty stream continue to the sea unvexed by dams or other man-made structures.

Obviously, that is not the law. It follows, therefore, that the *Cress* case cannot support the judgment below, either on the view that an underflow is the same as an overflow, or on the view that the water level in a non-navigable tributary has been raised. The holding below, far from being compelled by the *Cress* case, as the court below seemed to think (R. 38), would extend that already twice limited decision to a new and quite illogical extent.

II. THE JUDGMENT IS IN ANY EVENT INVALID FOR LACK OF A FINDING AS TO WHAT PROPERTY INTEREST OF RESPONDENT'S WAS TAKEN BY THE UNITED STATES

As we have indicated, the opinion of the court below discussed the question (R. 37) "whether there has been a taking of the plaintiff's land within the meaning of the Constitution", reasoned that "one of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture" (R. 37), and concluded (R. 39) that "the Government was not privileged, in the improvement of the navigability of the Mississippi, to 'take' without compensation the interest which we have discussed above in the plaintiff's land on Dardenne Creek."

But what, precisely, was the interest taken? It is clear from *United States* v. *Causby*, 328 U. S. 256, 267, that "an accurate description of the property taken is essential, since that interest vests in the United States," and that "the deficiency in findings cannot be rectified by statements in the opinion", citing *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-206, and *United States* v. *Seminole Nation*, 299 U. S. 417, 422. The findings here do not describe either the nature of the supposed drainage right, nor the supposed easement of underflooding; as in the *Causby case*, there is no description of the nature or duration of the servitude or interest supposed to have been taken. Nor is there a finding that

any easement whatsoever had been taken. The only finding even purporting to describe what the United States is required to pay compensation for is Finding 29, as follows (R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

Obviously, this is not a statement of a property interest at all. It is simply a conclusion to the effect that the United States had the "privilege" of carrying on governmental activity on a navigable river twenty-five miles downstream from respondent's land. But that "privilege" is really the right to engage in the improvement of navigation, a right which is conferred by the Constitution. Art. I, Sec. 8. This privilege or right or howsoever it may be characterized was not taken from respondent, and could not have been; nor would it have been bought from him by negotiation. For respondent had no such privilege or right. The United States has complete control over navigable streams and dams or other structures may be erected therein only by its permission. Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151

(33 U. S. C. 403); *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

Quite apart from any substantive deficiency, Finding 29 is technically inadequate. Certainly in the *Causby* case a finding to the effect that the United States had taken the privilege of maintaining the airport would not have been sufficient. It might just as reasonably be argued that when the United States takes land for use as an army camp it takes the "privilege" of maintaining such a camp. The fact of the matter is that whenever there is a taking in the constitutional sense it is a taking of specific property or of a specific interest in property, not the privilege of using the taken property for some particular governmental purpose. For the latter privilege never belonged to the original owner of the property.

Moreover, since there was no attempt to describe a property interest in respondent's land, there is no way of testing its sufficiency. As this Court said in the *Causby* case, 328 U. S. 256, 267, "It [the easement] is not described in terms of frequency of flight, permissible altitude, or type of airplane." So here, the property interest should be described in terms of permissible height of waters and duration thereof. And finally, the finding of the court below limits the Government's privilege to "permanently maintaining Lock and Dam No. 26." There is no warrant for so restrict-

ing the property interest said to have been taken. If the United States has taken and is compelled to pay for some right to maintain water in respondent's land at a certain height for certain periods, it should be able to use that property right in connection with any other dam it may build and not merely the present dam.

As we have said, these are technical inadequacies, and would require remand of this case for the making of appropriate findings sufficient to the support the judgment. We think, however, that the real vice of the findings cuts far deeper, and emphasizes what we have argued at length above, that there has been no taking of any interest in respondent's land, but simply the exercise of a governmental power on the part of the United States which has resulted in consequential injury to respondent's land, injury for which the Fifth Amendment does not require compensation to be paid. Actually, Finding 29, quoted above at p. 27, fully corroborates our view, and emphasizes our conclusion that there was no constitutional taking of respondent's land. Finding 29 undercuts the opinion below, underscores its unsoundness and lack of logic, and demonstrates with unusual distinctness why respondent is not entitled to recovery. The United States did not take anything that was his.

III. THE JUDGMENT BELOW CAN NOT BE SUPPORTED ON THE THEORY THAT CONGRESS HAS ASSUMED LIABILITY TO RESPONDENT.

In addition to claiming a right to compensation under the Fifth Amendment on the theory that there had been a taking of property, respondent contended that by the Act of August 26, 1937, 50 Stat. 844, 848, Congress had consented to recovery by respondent of $93,540.00 (Count II, R. 12). The Court below rejected this claim, holding that the Act did not constitute a waiver of the sovereign immunity from suit or a confession of liability for the consequences of building the dam (R. 37). Since respondent is free to rely on this contention to support the judgment below, insofar as he does not seek to enlarge his rights thereunder (*United States* v. *American Ry. Exp. Co.*, 265 U. S. 425), we reply to it here.

The court below was clearly correct in holding that the Act of August 26, 1937, *supra*, did not create any governmental liability. This Court has several times said that "A liability in any case is not to be imposed upon a government without clear words." *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196; *United States* v. *Zazove*, 334 U. S. 602, 617. And certainly the requisite clarity is lacking in the language of the 1937 Act. With respect to the project involving Lock and Dam No. 26, it provided (Fdg. 9, R. 26):

> Mississippi River between Missouri River and Minneapolis, Minnesota: The existing

project is hereby modified in accordance with the recommendation of the District Engineer in the report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress.

The report of the District Engineer concluded with the recommendation that authority be granted the Secretary of War to acquire low-lying lands and, as to respondent's land (referred to as Wiedmer Chemical Co. district) stated that the cost of acquiring 1,254 acres and the cost of tiling and ditching 366 acres in addition was estimated at $93,450.00 (Fdg. 8, R. 23-25). Thus, the 1937 Act merely authorized the Secretary of War to acquire the land if he thought it was advisable. It did not direct the Secretary to do so (cf. *United States* v. *Wilbur*, 283 U. S. 414), nor did it direct payment of any amount to respondent.

Moreover, the $93,540.00 represented simply the estimate of the District Engineer of the cost of acquiring 1,254 acres of ditching and tiling 366 acres (Fdg. 8, R. 24-26).[11] It did not purport to establish conclusively the value of the land and could not do so. Obviously it was contemplated that, if the authorization was executed, the amount should be determined in negotiations between the Secretary of War and the property owners.

In *Mitchell* v. *United States*, 267 U. S. 341, an Act of Congress at least as favorable to the claim-

[11] A preliminary report had concluded that there would be no damage to respondent's property (Fdg. 10, R. 26).

ant as the one on which respondent here relies was held not to support a suit in the Court of Claims. There, land was taken under authority of an act which appropriated $7,000,000 for—

> increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose.

This Court, denying a claim for indirect damages suffered as a result of the loss of a business, said through Mr. Justice Brandeis (267 U. S. at 345-346):

> By including in the appropriation clause the words "losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose," Congress doubtless authorized the Secretary of War to take into consideration losses due to the destruction of the business, where he purchased land upon agreement with the owners. But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. The constitutions of some require that compensation be made for consequential damages to private property resulting from public improvements. *Chicago* v. *Taylor*, 125 U. S. 161; *Richards* v.

Washington Terminal Co., 233 U. S. 546, 554. Others have, in authorizing specific public improvements, conferred the right to such compensation. *Ettor* v. *Tacoma*, 228 U. S. 148; *Joslin Manufacturing Co.* v. *Providence*, 262 U. S. 668. Congress had, of course, the power to make like provision here. Compare *United States* v. *Realty Co.*, 163 U. S. 427. But the mere reference in the appropriation clause to losses "resulting from the procurement of the land for this purpose", does not confer such a right. * * *

That decision is fatal to respondent's contention that his suit is "founded on a law of Congress."

Moreover, respondent's argument under the present heading (Br. Opp. 15-17) would do more than merely support the judgment below on a ground rejected below, it would enlarge the scope of that judgment; and of course respondent cannot do that where, as here, no cross-petition has been filed. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435; *Langnes* v. *Green*, 282 U. S. 531, 538-539.

To begin with, acceptance of the present contention would impose upon the United States liability in the amount of $93,540.00, rather than the $22,519.60 provided by the judgment below. Next, the $93,540.00 amount represents the purchase price of 1,254 acres of land and the cost of filing and ditching 366 acres (Br. Opp. 16; R. 36). But the United States will not, by the judgment, obtain fee title to the 1,254 acres as it would be entitled

under respondent's theory. Finally, the District Engineer's suggestion was that a total of 1,620 acres of land be acquired or be ditched and tiled, while the judgment below awards compensation for the impairment in value of 1,107.96 acres (Fdgs. 24, 26, 27 R. 34-35). The argument now advanced does not, therefore, even relate to the same land as does the judgment, and hence does not and can not support the judgment below.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the petition.

Respectfully submitted.

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